

review has been filed by one party, any other party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a cross-petition for discretionary review. The cross-petition may be conditional. See paragraph (b) of this section. A cross-petition shall be filed with the Judge during the 20 days provided by § 2200.90(b) or directly with the Executive Secretary within 27 days after the date of docketing of the Judge's report. The earlier a cross-petition is filed, the more consideration it can be given.

(d) *Contents of the petition.* No particular form is required for a petition for discretionary review. A petition should state why review should be directed, including: Whether the Judge's decision raises an important question of law, policy or discretion; whether review by the Commission will resolve a question about which the Commission's Judges have rendered differing opinions; whether the Judge's decision is contrary to law or Commission precedent; whether a finding of material fact is not supported by a preponderance of the evidence; whether a prejudicial error of procedure or an abuse of discretion was committed. A petition should concisely state the portions of the decision for which review is sought and should refer to the citations and citation items (for example, citation 3, item 4a) for which review is sought. A petition shall not incorporate by reference a brief or legal memorandum. Brevity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition.

(e) *When filing effective.* A petition for discretionary review is filed when received. If a petition has been filed with the Judge, another petition need not be filed with the Commission.

(f) *Failure to file.* The failure of a party adversely affected or aggrieved by the Judge's decision to file a petition for discretionary review may foreclose court review of the objections to the Judge's decision. See *Keystone Roofing Co. v. Dunlop*, 539 F.2d 960 (3d Cir. 1976).

(g) *Statements in opposition to petition.* Statements in opposition to petitions for discretionary review may be filed in

the manner specified in this section for the filing of petitions for discretionary review. Statements in opposition shall concisely state why the Judge's decision should not be reviewed with respect to each portion of the petition to which it is addressed.

(h) *Number of copies.* An original and eight copies of a petition or a statement in opposition to a petition shall be filed.

[51 FR 32015, Sept. 8, 1986; 52 FR 13832, Apr. 27, 1987, as amended at 55 FR 22783, June 4, 1990; 62 FR 35963, July 3, 1997]

§ 2200.92 Review by the Commission.

(a) *Jurisdiction of the Commission; issues on review.* Unless the Commission orders otherwise, a direction for review establishes jurisdiction in the Commission to review the entire case. The issues to be decided on review are within the discretion of the Commission but ordinarily will be those stated in the direction for review, those raised in the petitions for discretionary review, or those stated in any later order.

(b) *Review on a Commissioner's motion; issues on review.* At any time within 30 days after the docketing date of the Judge's report, a Commissioner may, on his own motion, direct that a Judge's decision be reviewed. In the absence of a petition for discretionary review, a Commissioner will normally not direct review unless the case raises novel questions of law or policy or questions involving conflict in Administrative Law Judges' decisions. When a Commissioner directs review on his own motion, the issues ordinarily will be those specified in the direction for review or any later order.

(c) *Issues not raised before Judge.* The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the

new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

§ 2200.93 Briefs before the Commission.

(a) *Requests for briefs.* The Commission ordinarily will request the parties to file briefs on issues before the Commission. After briefs are requested, a party may, instead of filing a brief, file a letter setting forth its arguments, a letter stating that it will rely on its petition for discretionary review or previous brief, or a letter stating that it wishes the case decided without its brief. The provisions of this section apply to the filing of briefs and letters filed in lieu of briefs.

(b) *Filing briefs.* Unless the briefing notice states otherwise:

(1) *Time for filing briefs.* The party required to file the first brief shall do so within 40 days after the date of the briefing notice. All other parties shall file their briefs within 30 days after the first brief is served. Any reply brief permitted by these rules or by order shall be filed within 15 days after the second brief is served.

(2) *Sequence of filing.* (i) If one petition for discretionary or interlocutory review has been filed, the petitioning party shall file the first brief.

(ii) If more than one petition has been filed but only one was granted, the party whose petition was granted shall file the first brief.

(iii) If more than one petition has been filed, and more than one has been granted or none has been granted, the Secretary shall file the first brief.

(iv) If no petition has been filed, the Secretary shall file the first brief.

(3) *Reply briefs.* The party who filed the first brief may file a reply brief. Additional briefs are otherwise not allowed except by leave of the Commission.

(c) *Motion for extension of time for filing brief.* An extension of time to file a brief will ordinarily not be granted except for good cause shown. A motion for extension of time to file a brief shall be filed at the Commission no later than 3 days prior to the expiration of the time limit prescribed in paragraph (b) of this section, shall comply with § 2200.40 and shall include

the following information: When the brief is due, the number and duration of extensions of time that have been granted to each party, the length of extension being requested, the specific reason for the extension being requested, and an assurance that the brief will be filed within the time extension requested.

(d) *Consequences of failure to timely file brief.* The Commission may decline to accept a brief that is not timely filed. If a petitioning party fails to respond to a briefing notice or expresses no interest in review, the Commission may vacate the direction for review, or it may decide the case without that party's brief. If the non-petitioning party fails to respond to a briefing notice or expresses no interest in review, the Commission may decide the case without that party's brief. If a case was directed for review upon a Commissioner's own motion, and any party fails to respond to the briefing notice, the Commission may either vacate the direction for review or decide the case without briefs.

(e) *Length of brief.* Except by permission of the Commission, a main brief, including briefs and legal memorandums it incorporates by reference, shall contain no more than 35 pages of text. A reply brief, including briefs and legal memorandums it incorporates by reference, shall contain no more than 20 pages of text.

(f) *Table of contents.* A brief in excess of 15 pages shall include a table of contents.

(g) *Failure to meet requirements.* The Commission may return briefs that do not meet the requirements of paragraphs (e) and (f) of this section.

(h) *Number of copies.* The original and eight copies of a brief shall be filed. See § 2200.8(d)(2).

(i) *Brief of an amicus curiae.* The Commission may allow a brief of an amicus curiae pursuant to the criteria of § 2200.24. Any brief of an amicus curiae must meet the requirements of paragraphs (b) through (h) of this section. No reply brief of an amicus curiae will be received.

[51 FR 32015, Sept. 8, 1986, as amended at 57 FR 41687, Sept. 11, 1992; 62 FR 35963, July 3, 1997]